



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WAKI, NAMBUYE & KIAGE, JJA]

CRIMINAL APPEAL NO. 99 OF 2017

BETWEEN

GODFREY WAWIRE NGEROAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (G.W. Ngenye, J) dated 30th June, 2016 In High Court Criminal Appeal No. 133 of 2013)

JUDGMENT OF THE COURT

This is an appeal arising from the Judgment of the High Court (**G.W. Ngenye-Macharia, J**) dated 30th June, 2016 on first appeal.

The background to the appeal is that the appellant was charged before the trial court with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006 (the S.O.A). The particulars of the offence were that on the 10th day of February 2010 in Nairobi, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MWK, a child aged 16 years. The appellant denied the charge prompting a trial in which the prosecution called six (6) witnesses to prove the charge against him, while the appellant gave unsworn evidence in his defence.

In summary, the prosecution's evidence was that at the material time the complainant, MWK (P.W.1), her two siblings, parents **KM** (P.W.3) and **EMM** (P.W.4) lived in the same plot as **Godfrey Wawire Ngero** (the appellant). Their respective living rooms were 1 metre apart. They had lived as such for one year and therefore knew each other very well. At night, the plot was well lit by electric bulbs placed at strategic positions. The occupants of the plot shared a common toilet.

On 9th February, 2010, P.W. 1 went to the toilet at around 1.00 a.m. She took too long to return. P.W.3 got anxious and went out to check on her. On the way, he met with the appellant whom he recognized with the help of electricity light from the bulbs outside their living rooms and the toilet. He was headed in the opposite direction, wearing only an underpant. P.W. 3 proceeded on and found P.W.1 leaning on a sink crying softly. She did not promptly respond to P.W.3's question to her as to why she was crying. He took her to P.W.4, to whom PW1 disclosed that she had been defiled by the appellant. Questioned further, she said she could not scream as the appellant had held her throat tightly, strangling her. P.W. 3 and

P.W.4 stormed the appellant's room and confronted him and his wife over the issue that same night, but the appellant allegedly offered no response to their concern.

The next day of 10th February, 2016, P.W.3 & 4 reported the matter to **Dandora Police Station**, where the report was booked in the O.B. while P.W.1 was referred to **Nairobi Womens Hospital** for examination and treatment. She was attended to by **Dr. Muhombe** who died before the trial and medical report was produced by **Dr. Charles Gachemu** (P.W.2). The major observation on the injuries was that the hymen was freshly perforated. P.W. 1 underwent further medical examination by **Dr. Zaphania Kamau**, a Police Surgeon on 29th March, 2010, whose observation was that P.W. 1 had old hymenal tears. Investigations into the incident were carried out by PCW **Everlyne Kemunto** (P.W.6) pursuant to which the appellant was arrested and arraigned before court as stated earlier.

When put to his defence, the appellant gave unsworn evidence. He confirmed that him and P.W.3 had been good neighbours for all the time they had lived together in that plot; that there were other people living in the same plot besides their respective families; that he was present at the plot on the material night when the incident is alleged to have occurred; that he never left his room that night; that if any wrong had been committed by him against P.W.1 on the material night, an alarm would have been raised to attract other occupants of the plot who would have come to testify against him as independent witnesses. It was also his contention that he was framed up in connection with the offence charged because he turned down P.W. 3's request for him to marry P.W.1 as his wife and second, to advance P.W.3 a loan of Kshs 200,000.00.

At the conclusion of the trial, the trial magistrate assessed and analyzed the record and appreciated that the evidence on the age of P.W. 1 was contradictory but nonetheless, discounted the contradictions as not being substantial, for the reasons that the birth certificate tendered in evidence was in law conclusive proof of the age of the complainant; that the inconsistencies on the age were all minor and these fell within the age bracket provided for in section 8 (4) of the S.O.A.

With regard to proof of penetration, the trial magistrate found sufficient corroboration for the complainant's evidence in medical evidence to the effect that the complainant's hymen was freshly perforated.

As for the identification of the appellant as the assailant, the trial magistrate believed the testimony of the complainant as corroborated by that of her parents, P.W. 3 & 4 and found that the appellant had been positively identified in connection with the offence.

Turning to the appellant's defence, the trial magistrate relied on the case of **Paul Kabati Kamau versus R. [2012] eKLR** and dismissed it as an afterthought for the appellant's failure to cross examine P.W.3 on the allegation that the defilement charge was a frame up.

On account of the above findings, the trial magistrate found the prosecution case proved to the required threshold, convicted the appellant of the offence charged and sentenced him to serve seventeen (17) years imprisonment.

Being dissatisfied with that decision, the appellant appealed to the High Court raising various grounds.

The 1st appellate court reassessed and re-analyzed the record in light of the complaints the appellant had raised against both his conviction and sentence. Relying on the case of **Francis Omuromivs. Uganda, Court of Appeal- Criminal Appeal No. 2 of 2000**, the Judge accepted the production of the birth certificate as proof of the age of the minor. As for the alleged existence of discrepancies in the prosecution case, the Judge discounted them because they related to the discrepancies on the age of the minor in respect of which the Judge had accepted the production of the birth certificate as indicating the correct age of the complainant.

On penetration, the Judge found no inconsistency in the medical evidence tendered by P.W.2 and P.W.5 as the two had examined P.W. 1 at different times, that is why the testimony of P.W. 2 who had examined

the complainant soon after the assault talked of a freshly torn hymen, while P.W. 5 who examined her after several days had lapsed talked of an old torn hymen. On that account, the Judge ruled that penetration had been proved.

On the identification of the appellant, the Judge took into consideration the holding in **Charles Maitanyi Vs. R. [1986] KLR 198** for the principle that courts need to exercise caution and circumspection before convicting an accused person on the testimony of identification especially where the evidence is that of a single identifying witness; and **Regina versus Turnbull [1976] 3 WLR 445**, on the guidelines for receiving and acting on evidence of identification.

Applying the above threshold to the record before her, the Judge made findings that P.W. 1 knew the appellant well before the incident; that she explicitly described how the appellant defiled her which was proof that she was conscious of what was happening to her and could clearly identify the appellant; that P.W.1, 3 & 4s' evidence that the appellant had been their neighbor for long was corroborated by the appellant's own admission. Further that P.W.3's evidence that after the complainant took long to come back from the toilet, he went to look for her and met the appellant coming from the direction of the toilet where the complainant was found crying and immediately thereafter disclosed to her parents that she had been defiled by the appellant was believable. The Judge therefore entertained no doubt, as the trial magistrate had met that there was sufficient light from bulbs strategically placed in the plot which enabled both P.W.1&3 identify the appellant and place him at the scene of the crime.

Turning to the complaint that the appellant's defence had not been considered by the trial magistrate, the Judge found on the contrary that it had been thoroughly considered and found not plausible. On account of the above reasoning the Judge dismissed the appeal and affirmed both the conviction and sentence.

Undeterred, the appellant is now before this Court on a second appeal raising five grounds in supplementary grounds of appeal. These may be summarized as follows: that the learned Judge erred in law when she failed to appreciate that Section 200(3) of the Criminal Procedure Code? was breached; the age of the victim was not proved; the trial in the lower court was irregularly conducted; the witnesses were hostile and therefore impeachable; and lastly, that the first appellate court failed to give adequate reconsideration of his defence.

The appeal was canvassed by way of written submissions filed and adopted by the appellant without orally highlighting the same. The state opposed the appeal through oral submissions made on its behalf by the learned Senior Assistant Director of Public Prosecution (SADPP), **Mr. O'mirera Moses**.

In summary, it is the appellant's submissions that the trial was a nullity for the failure to observe the mandatory provisions of section 200 (3) of the CPC; that the two courts below fell into error when they failed to order a medical assessment to establish the age of the victim upon noticing that there were contradictions in the evidence on the age of the complainant; that the birth certificate was 'sneaked in' and therefore had no probative value; that the prosecution's evidence was full of contradictions and therefore not credible and should not have been the basis both for finding and affirming his conviction and sentence by the two courts below; and lastly, that his defence was not properly considered.

Rising to oppose the appeal, **Mr. O'Mirera** submitted that the two courts below considered the entire evidence on the record and were satisfied that it is the appellant who defiled the complainant; that the birth certificate tendered in evidence was sufficient proof of the age of the victim; that any inconsistencies noted in the determination of the age of the complainant were minor as correctly found by the two courts below and did not therefore vitiate the prosecution's case; that medical evidence corroborated the evidence of the complainant that she had been defiled; that the two courts below accepted the evidence of P.W. 1 as truthful; that there was light from a nearby bulb in the compound which enabled P.W.1 to recognize the appellant as the person who defiled her, and P.W.3 to recognize the appellant as the person he met half-naked coming from the direction where the complaint was also found crying saying that she had been defiled by the appellant.

Turning to the alleged non-compliance with the prerequisites in section 200(3), counsel submitted that the

case law relied upon by the appellant supported the old view, while modern trends in judicial pronouncements on the construction and application of that provision are that noncompliance with the said provision is not fatal to the prosecution's case, but counsel failed to provide such authorities despite being granted leave of the court to avail authorities in support of his proposition. The above assertions notwithstanding, counsel submitted that should the court find that the trial stood vitiated, then the state urges for a retrial which will be expedited.

This is a second appeal. This Court is restricted to addressing itself to matters of law only. It will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Karingo versus Republic [1982] KLR 213** at page 219.

We have on our own revisited the record in light of the rival submissions set out above. The issues that fall for our determination are the same as those raised by the appellant in his grounds of appeal summarized above. The first issue to be addressed, which may well be determinative of the appeal, is whether failure to comply with the provisions of Section 200(3) of the CPC was fatal to the prosecution's case.

Section 200 (3) provides as follows:

(3) "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right".

We have examined the trial record and established that it was conducted by three different magistrates. The first was **Hon. T. Ngugi** who recorded the evidence of PW1, PW2 and PW3. On 6th July 2011, **Hon. T. Mwangi**, SRM took over the proceedings and rejected **Mr. Ombeta's** request that the matter be heard *denovo* in favour of the prosecution's view that the matter do proceed from where the previous magistrate had left it. It was pursuant to the above directions that **Hon. T. Mwangi** SRM proceeded to record the evidence of P.W.4 &5. On 11/02/2014, the file was placed before **Hon. E.K. Nyutu**, Ag. PM who, without complying with the provision in section 200(3), took the evidence of P.W. 6, ruled that the appellant had a case to answer, complied with section 211 CPC, put the appellant on his defence, drew up and delivered the Judgment dated 22nd September, 2014, convicted the appellant and sentenced him.

This Court has in the past emphatically pronounced itself on the issue of non-compliance with this requirement of the law. We need only refer to the case of **John Bell Kinengeni vs. Republic (2015) eKLR**, where the Court stated:

"This Court has on numerous occasions pronounced itself on the proper interpretation and application of these two provisions. We cite a few by way of illustration. In Richard Charo Mole NRB Criminal Appeal No. 135 of 2004, this Court approved the principles set in Ndegwa versus Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006, the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandiga (supra) the court ruled that the mere mention in the judgment that section 200(3) was complied with is hollow without any evidence

from the record that it was actually complied with in accordance with the law. This Court stressed in *Ndegwa vs. Republic* [1985] KLR 534 thus:

“No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed; violated or abandoned when it comes to protecting the liberty of the subject as he is the most sacrosanct individual in the system of our legal administration”

The Court has also emphasized that it was not enough for the trial court to state that it was aware of the provisions, but must record the manner of compliance. See **Simon Kimani Mwangi v. R.** [2016] eKLR.

More recently, in the case of **Joseph Angote vs. Republic** [2018] eKLR, the Court made the following observations.

“It is apparent from the above that the learned Judge did not comply with the provisions of section 200 of the Criminal Procedure Code. The question is whether the appellant was prejudiced by this lapse and what is the effect on the proceedings. In a hearing, the observation of the demeanour of witnesses is very crucial and this is why an appellate court would ordinarily take seriously a comment made by a trial judge on the demeanour of witnesses. Therefore, a judge who has not had the benefit of seeing witnesses testify may be at a disadvantage to the prejudice of an accused person. It is for this reason that the accused person is given the opportunity to make an election whether to have the hearing of the case start de novo, or witnesses recalled or the hearing proceeds from where the former trial judge had left it. Where an accused person has not had the benefit of this right, his right to a fair trial may be compromised depending on the circumstances of each case”.

In light of the above authorities, we perceive that compliance with the said provision is mandatory. In the instant appeal, there was no compliance with the said provision. We have noted that **T. Mwangi**, SRM ignored the wishes of the appellant that the matter starts *denovo* when she took over the trial. That was not open to her because the provision is clear that an accused person has a right to demand that any witness who had testified before the former magistrate’s be resumed and reheard by the succeeding magistrate. It is an indefeasible right. The 3rd trial magistrate appears to have been oblivious of the legal requirements altogether. The failure to comply vitiated the proceedings.

The above being the position, the question we have to ask ourselves is whether to order a retrial as requested by the state. Faced with similar circumstances, the Court in **Joseph Angote versus Republic** (supra) reviewed a wealth of case law on circumstances under which a retrial would be ordered and concluded as follows:

“The question that now arises is whether this Court should order a retrial. Similarly, in John Bell Kinengeni vs. Republic(supra), the court observed in Armed Daramshi Sumar vs. Republic [1964] E.A. 481, the former Court of Appeal held that the Court will not order a retrial where a conviction is vitiated by a gap in evidence or defect for which the prosecution is to blame; and that where the conviction is vitiated by a mistake on the part of the court, an order for retrial will not be automatic, but the court will have to weigh the circumstances”. In Fatehali Manjiv vs. Republic [1966] E.A. 343, the predecessor of this Court stated as follows: “In general a retrial will be ordered only where the original trial, was defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where conviction is vitiated by the mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances, and an order for a retrial should only be made where the interest of justice require it.” “In Benard Lolimo Ekimat versus Republic Criminal Appeal No. 151 of 2004, the court ruled that: “The principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice requires it.” “In Muiruri vs. Republic [2003] KLR 552, the Court went further to state that a retrial will only be ordered where the interests of justice require it if it is unlikely to cause

injustice to the appellant. The Court suggested some of the factors that the court may take into consideration when deciding either way. These include but are not limited to illegalities or defects in the original trial, (see Zedekiah Ojoondo Manyale versus Republic, Criminal Appeal No. 57 of 1980), the length of time which has lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's. See also the case of Ahmed Sumar versus Republic [1964] EA 481 at page 483; wherein the predecessor of this Court, stated that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial, but where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not follow that a retrial would be ordered. It depends on the facts and circumstances of each case and more importantly, the interest of justice intended to be served."

The relevant circumstances in this case are that the offence took place about nine years ago on 10th February, 2010; the appellant was arrested on 30th March, 2010 and was partially on bond during his trial until the 22nd October, 2014 when he was incarcerated upon conviction and sentence. From the date of sentence, it is now approximately four (4) years and four (4) months. . The sentence imposed was seventeen (17) years, which cannot be said to be substantially served.

The state has assured us that any retrial ordered will be expedited. In those circumstances, it is our view that justice would be served by an order of retrial. We therefore make the following orders:

1. The appeal succeeds to the extent that trial is declared a nullity,
2. The conviction of the appellant is hereby quashed and the sentence set aside.
3. An expeditious retrial shall be held before another magistrate of competent jurisdiction other than **Hon. E.K. Nyutu**.
4. The retrial shall take no more than ninety (90) days.

In view of those orders, we say no more on the other issues raised by the appellant lest we prejudice the retrial.

Those are the orders of the Court.

Dated and delivered at Nairobi this 8th day of February, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

DEPUTY REGISTRAR